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IN THE

Supreme Court of the United States

October Term, 1962.

No. 354

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AND THE JUDGES THEREOF,

Petitioners,

v.

TIMOTHY J. MAHONEY, ESQUIRE, and His Partners, Trading as KRUSEN, EVANS & BYRNE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

No.

OCTOBER TERM, 1962.

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AND THE JUDGES THEREOF,

Petitioners,

v.

TIMOTHY J. MAHONEY, ESQUIRE, AND HIS PARTNERS, TRADING AS KRUSEN, EVANS & BYRNE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The United States District Court for the Eastern District of Pennsylvania and the Judges thereof pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 20, 1962. That judgment reversed an order entered by the United States District Court for the Eastern District of Pennsylvania, Francis L. Van Dusen, J., imposing a fine on an attorney under a Standing Order of the District Court for failure to comply with prescribed pretrial procedures, which failure resulted in waste of judicial time and the time of judicial employees.

OPINIONS BELOW.

The opinion of the District Court appears at 191 F. Supp. 763. It, together with the order entered, is printed as Appendix A of the Petition. The opinion of the Court of Appeals and the dissenting opinions are not yet reported. They are printed as Appendix B of the Petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 20, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

STATUTES INVOLVED.

The following Statutes, Rules and Standing Orders of the United States District Court for the Eastern District of Pennsylvania are involved in this Appeal:

1. 28 U. S. C. Sec. 2071.

"Rule-making power generally.

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

2. Rule 16 of the Federal Rules of Civil Procedure.

"Pre-trial procedure; formulating issues.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

3. Rule 83 of the Federal Rules of Civil Procedure.

"Rules by District Courts.

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

4. Standing Order of the United States District Court for the Eastern District of Pennsylvania dated October 23, 1958.

Appears as Appendix C of the Petition.

5. Standing Order of the United States District Court for the Eastern District of Pennsylvania dated February 8, 1960.

Appears as Appendix D of the Petition.

QUESTION PRESENTED.

A Standing Order of the United States District Court for the Eastern District of Pennsylvania requires the filing of pre-trial memoranda by parties in civil litigation. Another Standing Order provides that in the event of non-compliance, sanctions may be imposed, including the imposition of fines, costs, or counsel fees. The question presented is:

May a United States District Court impose a monetary sanction on an attorney, but without holding the attorney in criminal contempt, where the fine is to compensate the United States for wasted judicial time caused by the attorney's negligent failure to comply with a Standing Order of the Court regularizing pre-trial procedure, and to discourage such conduct in the future?

STATEMENT OF THE CASE.

Basis of Federal Jurisdiction.

The jurisdiction of the Court of first instance was based upon diversity of citizenship of the plaintiff and defendant under 28 U. S. C. Sec. 1332(a)(1).

Parties.

The petitioners are the United States District Court for the Eastern District of Pennsylvania and the Judges thereof including Judge Francis L. Van Dusen, who entered the Order invalidated by the Court of Appeals. Respondents are Timothy J. Mahoney, Esquire and his partners trading under the name of Krusen, Evans and Byrne (formerly Krusen, Evans and Shaw), against whom the sanction was assessed under Judge Van Dusen's order.

Facts.

This cause arises out of an action for personal injuries filed in the United States District Court for the Eastern District of Pennsylvania by John Gamble, a longshoreman, against Pope & Talbot, Inc., a shipowner, on April 24, 1958. The defendant impleaded Jarka Corporation of Philadelphia as third-party defendant on September 11, 1959. The merits of that claim and claim over were not before the Court of Appeals nor are they before this Court.[1] Respondents represented defendant in the action.

The United States District Court for the Eastern District of Pennsylvania had adopted a Standing Order entitled "Pre-Trial Conferences in Other Than Protracted

1. The case was tried on its merits in March 1961 and judgment was entered for plaintiff. A partial new trial on the issue of damages was granted by the District Court on November 8, 1961 but the case was settled on November 13, 1961.

Cases" on October 23, 1958 which makes the filing of pre-trial memoranda by all counsel in an action mandatory, specifies what shall be contained in the memoranda and sets forth a schedule of the time within which each pre-trial memorandum must be filed with the Clerk of the Court and copies served on opposing counsel (App. C. 43a).

Another Standing Order entitled "Imposition of Sanctions with Respect to Pre-Trial Procedures" was adopted by the same court on February 8, 1960 (App. D, 46a). It reads as follows:

> "For failure to appear at a pre-trial conference, or to participate therein, or to prepare therefor, the Court, in its discretion, may make such order with respect to the imposition of fines, costs and counsel fees, as is just and proper; with respect to the continued prosecution of the cause (complaint, crossclaim or counterclaim), a dismissal may be entered, or as to the defense, the preclusion of all or any part thereof, as is likewise just and proper."[2]

Acting pursuant to the Standing Order of October 23, 1958, the Clerk placed the action on the pre-trial list in the Autumn of 1959. The list was published November 9, 1959. Counsel for plaintiff filed his pre-trial memorandum in compliance with the Standing Order, and under a covering letter dated December 9, 1959 served opposing counsel with

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2. This Order was patterned after Rule 4:29-1(c) of the Revision of the Rules Governing the Courts of the State of New Jersey. That Rule provides:

> "(c) For failure to appear at a pretrial conference or to participate therein or to prepare therefor, the court in its discretion may make such order with respect to the imposition of costs and counsel fees and with respect to the continued prosecution of the cause, including dismissal, or of the defense thereof, as is just and proper."

It is the practice in the New Jersey courts to impose the fees or the costs involved under this Rule directly on the derelict attorney and to provide in the order that such fees or costs may not be passed on to the attorney's client.

copies thereof (10a). The pre-trial memoranda of defendant and third-party defendant were due under the Standing Order on January 11, 1960. Counsel for the third-party defendant filed his memorandum on that date in compliance with the Standing Order and sent copies thereof with a covering letter to both opposing counsel (10a). Counsel for defendant, respondents here, did not file a pre-trial memorandum at that time.

Thereafter, a pre-trial conference was scheduled for 10:30 A. M. on November 23, 1960 before the Honorable Francis L. Van Dusen and notice thereof was sent to all counsel approximately two weeks prior to that date. It was not until the afternoon of November 22, 1960, the eve of the scheduled pre-trial conference and well over ten months after it was due under the provisions of the October 23, 1958 Standing Order, that counsel for defendant finally filed a pre-trial memorandum.[3] Copies of this memorandum were not received by trial counsel for the plaintiff until the morning of the scheduled pre-trial conference and the pre-trial judge did not see the memorandum until minutes before the conference.

In summary, the respondents had notice of the necessity of filing a pre-trial memorandum in November 1959 when the pre-trial list was published; they received further notice one month later when they received plaintiff's pre-trial memorandum; they received another reminder when third-party defendant's pre-trial memorandum was served on them after another month had passed; they received an-

3. On the same date, i.e., November 22, 1960, defendant's counsel also filed an affidavit to be attached to answers to interrogatories. The interrogatories in question were filed by plaintiff on August 14, 1958. Under Federal Rule of Civil Procedure 33, they should have been answered within fifteen days. On May 11, 1959, plaintiff moved for an order compelling defendant to answer the interrogatories, stating in the motion that counsel for defendant had been repeatedly requested to answer them. An order was entered on the same day requiring the answers to be filed within 20 days and directing that judgment be entered against defendant if the answers were not filed within that time. The answers were ultimately filed on May 28, 1959, but without the required affidavit attached thereto.

other reminder from the Clerk two weeks before the pre-trial conference. Respondents ignored or disregarded all of these notices and reminders, and did not file their memorandum until the evening before the pre-trial, more than ten months after it was due. They did not notify the pre-trial Judge or other counsel of their late filing, and they did not request a continuation of the pre-trial conference.

Because of the delay in filing defendant's pre-trial memorandum, neither counsel for plaintiff nor the pre-trial judge had an opportunity to review the memorandum before the pre-trial conference, and the purpose of the conference—for example, to narrow issues, obtain agreements on such matters as the authenticity of documents, and to explore settlement possibilities—was frustrated.[4]

On December 9, 1960, plaintiff filed a motion to strike defendant's pre-trial memorandum, leave for the filing of such motion having been granted at the pre-trial conference. A hearing was held on this motion before the pre-trial judge on February 20, 1961. On February 23, 1961, Judge Van Dusen filed an order and memorandum opinion denying in part plaintiff's motion to strike defendant's pre-trial memorandum because it was too drastic a measure to take where the default was counsel's and not the party's.[5] However, the order contained three paragraphs imposing sanctions (5a). The first struck from defendant's pre-trial

4. This was one of eight pre-trial conferences scheduled at half-hour intervals before the pre-trial judge that day. To be prepared for these, it was essential that he have the pre-trial memoranda of the parties well in advance.

5. During argument on the motion, counsel for plaintiff took the position that the only appropriate sanction was the striking of defendant's entire pre-trial memorandum, a sanction in effect against the party since the party would thereafter be unable at trial to call the witnesses listed in the pre-trial memorandum. Cf. *Payne v. S. S. Nabob*, 302 F. 2d 803 (3d Cir. 1962). Counsel for the defendant, on the other hand, urged that no sanction could appropriately be entered against his client since the dereliction involved was not the client's, but rather the attorney's; but he further argued that the court had no power to sanction the attorney, with the result that in his opinion no sanction of any kind could be imposed.

memorandum the names of two witnesses who had not theretofore been disclosed during the course of discovery. The third paragraph invited counsel for the plaintiff to submit an order for the imposition of counsel fees and other costs attributable to the delay.[6] The second paragraph of the order, which is the paragraph pertinent here, provided as follows:

> "(2) counsel for defendant shall pay a fine of one hunderd dollars ($100.00) to the United States of America."

In explaining the reasons for the imposition of this fine, Judge Van Dusen stated in his memorandum opinion:

> "In view of the time of judicial employees of the Government wasted as a result of the late filing of this memorandum, a fine shall be paid by counsel for the defendant to the United States of America (see Standing Order of February 8, 1960)."

He further pointed out in footnote 2 of the opinion that:

> "The assertion that the court is not inconvenienced by filing such a memorandum with the Clerk the day before the pre-trial conference is inaccurate, since the trial judge in such circumstances normally would not receive the document in time to prepare for the conference. Also, consideration of this Motion, etc., has been required by this delay."

The waste of judicial time as a result of the late filing of the memorandum was not alone confined to the pre-trial conference and consideration of the subsequent motion to

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6. With respect to the third paragraph, counsel for plaintiff had informed the pre-trial judge at the argument on the motion that he would not wish counsel fees or costs imposed on defendant's attorney (17a-18a). Consistent with this representation, he did not submit an order for such fees and costs after the court's order was entered.

strike the pre-trial memorandum. In addition, the time of the Calendar Judge of the Court was occupied on February 16, 1961 when an application was made for a continuance of the trial pending disposition of the motion to strike the pre-trial memorandum.[7]

Respondents filed their notice of appeal from Paragraph (2) of the order. No appellee was named in the notice. Service of this notice was made on the United States; however, it did not enter an appearance or file a brief.

No appellee appeared to be heard in the proceeding before the Court of Appeals; however, John J. Dautrich, Esquire, was requested by the Judges of the District Court to ask leave to file an *amicus curiae* brief in support of the power of the District Court to impose the fine on respondents. He was permitted by the Court of Appeals to do so.

On July 20, 1962 the Court of Appeals, having sat *en banc* to hear the appeal, handed down its opinion reversing the District Court and ordering that judgment be entered in favor of respondent with respect to Paragraph (2) of the District Court's order (28a). Chief Judge Biggs, and the late Judge Goodrich dissented from the opinion of the Court (28a, 35a).

The majority opinion, written by Judge McLaughlin, concluded that a district court possesses no inherent power to fine an attorney who has not been held in criminal contempt after a hearing (24a). It also concluded that nothing in the Federal Rules authorizes sanctions in the form of penalties to be imposed upon an attorney in civil litigation, and stated that fining an attorney for conduct not amounting to criminal contempt as specified in 18 U. S. C. Sec. 401 and without adherence to the procedure outlined in Rule 42

7. The continuance was granted and the trial was delayed. In the opinion of the pre-trial judge, who later became the trial judge, the frustration of the pre-trial conference also resulted in the trial taking eight court days, rather than the six days allotted to it in his estimate, and the four normally expended in similar trials involving longshoremen's claims.

of the Federal Rules of Criminal Procedure violates the Fifth Amendment (24a-25a).

Judges Hastie and Kalodner concurred in the result reached by the majority on the basis that the District Court exceeded its authority by imposing a criminal sanction, without legislative authority, for conduct which did not amount to a contempt of court; however, they rejected other references in the opinion of Judge McLaughlin (28a).

Dissenting opinions were filed by Chief Judge Biggs and the late Judge Goodrich (28a, 35a). Chief Judge Biggs dissented on the ground that the action of the lower court was simply an exercise of disciplinary authority with no necessary criminal connotation, that the Standing Orders involved are valid as rules of court made pursuant to Rules 16 and 83 of the Federal Rules of Civil Procedure and that even if the Federal Rules of Civil Procedure did not provide authority for the Standing Orders, that the District Court had the inherent power to impose the sanction.

Judge Goodrich concurred with the dissent of Chief Judge Biggs and stated that, "Because a court has authority to deal with only specified types of cases or controversies does not mean that the judge of such a court is caponized. So far as the things he deals with are concerned, he has the authority, surely, of any judge in any court of record. . . . If a judge is going to organize, either alone or with fellow judges, the business of the court, there must be authority to impose reasonable sanctions for the breach of reasonable rules" (35a-36a).

On July 31, 1962, the Court of Appeals granted a petition to stay its mandate until September 18, 1962 and on August 3, 1962 granted the petition of the present petitioners for leave to intervene as parties appellees (42a).

THE REASON FOR GRANTING THE WRIT OF CERTIORARI.

This writ is sought because of the important question presented concerning the administration of justice in the Districts Courts. More particularly, this Court is asked to consider the power of District Courts to impose, pursuant to rules regularizing the conduct of pre-trial proceedings, a civil sanction, in the nature of a fine, on attorneys practicing before them for failure to comply with the pre-trial procedures outlined in those rules.

In order to deal with the mounting number of cases pending in the District Courts, the device of pre-trial conferences under Rule 16 of the Federal Rules of Civil Procedure is widely employed to simplify issues, to shorten trial time, and to effect settlements when possible. But it has been found that effective pre-trial requires effective preparation by court and counsel. Therefore, procedures have been set up in many courts similar to the Standing Order of the District Court for the Eastern District of Pennsylvania to regularize pre trial practice.[8]

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8. D. Ariz., Rule 13, 1 F. R. S. 878; N. D. Cal., Rule 16, 5 F. R. S. 1077; S. D. Texas, Rule 30, 1 F. R. S. 1075; D. S. D., Rule 11, 1 F. R. S. 2d 1200; D. N. D., Rule IV, 1 F. R. S. 2d 1154; W. D. Okla., Rule 16, 1 F. R. S. 2d 1172; D. Ore., Rule 34, 1 F. R. S. 2d 1182; E. D. Wis., Rule 12, 1 F. R. S. 1210; N. D. Fla., Rule 5, 2 F. R. S. 2d 1046; D. Colo., Rule 12, 4 F. R. S. 2d 1104; D. Conn., Rule 10, 5 F. R. S. 2d 1084; D. Neb., Rule 21, 5 F. R. S. 2d 1134; N. D. Ga., Rule 18, 18 F. R. S. 950; N. D. and S. D. Iowa, Rule 16, 18 F. R. S. 959; W. D. Mich., Rule 4, 14 F. R. S. 1002; S. D. Ohio, Rule 10, 14 F. R. S. 1007; W. D. Ark., Rule 3, 12 F. R. S. 856; D. Minn., Rule 4, 5 F. R. S. 2d 1117.

Also, D. Alaska, Rule 9, 3 F. R. S. 2d 1138; S. D. of Cal., Rule 9, 24 F. R. S. 914; D. D. C., Rule 12, 4 F. R. S. 2d 1123; W. D. of La., Rule 5, 24 F. R. S. 930; W. D. of Mo., Rule 20, 1 F. R. S. 2d 1099; S. D. N. Y., Rules 13-16, 4 F. R. S. 2d 1158; M. D. N. C. (brief on disputed points of law only, Rule 22(f)), 1 F. R. S. 2d 1147; W. D. Pa., Rule 5, 1 F. R. S. 2d 1195; D. Nev., Rule 11, 1 F. R. S. 2d 1120; E. D. Pa., *supra*.

The problem is, then, what sanction to impose when there is a failure on the part of counsel to comply with the procedures established. Here, the District Judge believed that sanctions against the party, under the circumstances of the case before him, would be basically unfair since the dereliction was that of the attorney and not the party. This Petition therefore presents a question complementary to, but unresolved by, this Court's recent opinion in *Link v. Wabash Railroad Co.*, 370 U. S. 626 (1962), 30 U. S. L. Week 4534 (U. S. June 25, 1962).

There, this Court, with the Chief Justice and Justices Black and Douglas dissenting, affirmed the dismissal with prejudice of a civil action for personal injuries where the precipitating event leading to the dismissal was the failure of plaintiff's counsel to appear for a pre-trial conference. The authority of the District Court to enter the dismissal was held not precluded by Rule 41(b), but was found to lie in the Court's "'inherent power', governed not by rules or statutes but by control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." The Court thus upheld the extreme end of the spectrum of remedies which may be available to a District Court to guard against dilatoriness on the part of an attorney practicing before it, namely, a remedy the burden of which falls on the party represented by the attorney through dismissal of his cause.

The District Judge in the case involved in the present Petition, although given the authority under the Standing Order of his Court to impose a penalty on the party whose attorney failed to file the pre-trial memorandum, nevertheless felt that justice required him to act under the alternative remedy available to him under the Standing Order—to impose a sanction on the attorney involved. He did this in the form of a fine, both to compensate the United States for the waste of judicial time ensuing from the default and to discourage such conduct by this and other attorneys in the future.

By holding that the District Court had no power to act as it did, the Court of Appeals for the Third Circuit cut off an effective remedy available to a District Court to enable it to ensure compliance with its pre-trial procedures since rarely would the failures of counsel be intentional, rather than simply negligent, and thereby amount to a criminal contempt. The practical effect will, of course, be that most, if not all, derelictions of counsel will in the future have to be visited upon clients rather than counsel where the conduct of counsel is short of criminal contempt.

Petitioners respectfully urge that the Court of Appeals erred in two material respects in adopting this position. First, in equating the fine to a criminal penalty and then finding no authority for the District Court's action in the criminal contempt statute, 18 U. S. C. Sec. 401, it disregarded the compensatory basis of the sanction imposed. It is apparent that the District Judge was not concerned with a penalty in a criminal sense in imposing the sanction. As the Court of Appeals conceded, he did not purport to rely on his criminal contempt powers or to proceed criminally. His concern was with the delay of justice and the expense occasioned the United States by the failure of defendant's counsel to timely file the pre-trial memorandum. It might also have been anticipated that imposing the sanction on counsel would encourage compliance with the Standing Order in the future. However, this does not make the sanction criminal; rather, if anything, it is more analogous to a fine for civil contempt which involves a power clearly possessed by a District Court. Any sanction imposed by a court of necessity is a vindication of that court's authority and encourages compliance in the future. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 445 (1911).

Second, the Court erred in holding that Rule 83 did not give the District Court power to promulgate its Standing Order imposing sanctions. While conceding the power of the District Court to establish a regularized pre-trial

practice by its Standing Order of October 23, 1958, it found the Standing Order imposing sanctions to involve a "basic disciplinary innovation" and invalid under *Miner v. Atlass*, 363 U. S. 641 (1960). However, Justice Harlan, who wrote the majority opinion in *Miner*, clearly indicated in *Link* that the failure of the Federal Rules of Civil Procedure to provide the exact power exercised by the District Court is no basis for denying the power exercised, providing that the power exercised is not inconsistent with those Rules.

Certainly there is nothing in Rule 16 or any other Rule which is in conflict or inconsistent with the District Court's Standing Orders of October 23, 1958 and February 8, 1960. Nor is it a novelty or innovation under the Rules to impose sanctions on counsel. Under Rule 37(a), the Court may award expenses, including attorneys' fees, against an attorney who, without substantial justification, advises a deponent not to answer questions put to him. *Osolin v. S. S. Colorado*, 1 F. R. Serv. 2d 37 a. 22, Case 1 (N. D. Calif. 1958). Further, in Rule 75(e), the Courts of Appeal are given the power to impose costs upon offending attorneys where they have included portions of the record not necessary for disposition of an appeal. It is true, that in this case the sanction was payable to the United States because of wasted time of the Judge and judicial employees. However, the principle is the same, as the party injured by default of counsel, in this case, the United States Government, is made whole by the sanction imposed.

The effect of these errors is to seriously cripple the efforts of District Courts to reduce congestion of their dockets. Measures to reduce congestion require effective sanctions to enforce them. While the overwhelming majority of attorneys will comply willingly with court directives, there is always that small minority of attorneys whose carelessness and neglect account for such an overwhelming share of the wasted energies and the time of judges and judicial employees. As to these, the remedy applied by the District Court in this cause was fair and effective. It was

justified by the inherent powers of a District Court and the powers granted it to fashion suitable local rules pursuant to Rule 83. If permitted to stand, the decision of the Court of Appeals not only adversely effects measures to deal with court congestion in the Third Circuit but as a precedent inhibits similar efforts in other Circuits.

CONCLUSION.

A writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 24579.

JOHN GAMBLE

v.

POPE & TALBOT, INC.

v.

JARKA CORP. OF PHILADELPHIA.

MEMORANDUM SUR MOTION TO STRIKE PRE-TRIAL MEMORANDUM (DOCUMENT NO. 25).

(Filed Feb. 23, 1961)

VAN DUSEN, *J.* February 23, 1961.

This case is before the court on plaintiff's Motion To Strike defendant's pre-trial memorandum, which was filed over ten months after its due date under the Pre-Trial Standing Order of this court, but the day before the pre-trial conference and over three months before the trial. Plaintiff's pre-trial memorandum (Document No. 18) alleges liability for serious injuries, including a herniated disc in the lumbosacral region with bilateral sciatica, possible herniation of disc in the cervical area, cerebral concussion with post-concussion syndrome, and fractures of the hand and arm. Also, it claims past loss of earnings

and a permanent partial disability of a 45-year-old longshoreman resulting in a future loss of one-third of his earning power, with a total value of the claim exceeding $113,000. as of December, 1959. Defendant's pre-trial memorandum (Document 20) alleges a meritorious defense (unreported accident and no negligence or unseaworthiness, as explained at the pre-trial conference—see paragraph 5 of Document No. 25) and contributory negligence reducing any damages. Plaintiff concedes that the relief he seeks would result in a default judgment on the issue of liability and preclude defendant from introducing any evidence to reduce the damages established by plaintiff's witness, but contends that inexcusable neglect is involved. Defendant alleges that the failure to file its pre-trial memorandum when due was due to an oversight of counsel (see page 2 of Document No. 27) and points out that neither counsel for plaintiff or third-party defendant pointed out the omission to it. See *Teal v. King Farms Company*, 18 F. R. D. 447, 448 (E. D. Pa. 1955), holding that such a statement by counsel will be accepted "as made in entire good faith." The plaintiff has shown no substantial prejudice on this record in view of the over three months elapsing between the filing of the pre-trial memorandum and the trial.[1]

The able counsel for plaintiff has been able to find no authority, and the court has been able to find none, in support of such drastic action as plaintiff requests. The relief

1. Plaintiff claimed at the argument that he has been prejudiced by the inclusion in defendant's list of witnesses of four officers on the ship where the accident occurred (1-4 under C of Document No. 20), as to whom he could have had discovery if the defendant's pre-trial memorandum had been filed in January 1960, when due, but the names of at least two of these witnesses were in paragraphs 4 (Taylor) and 10(r) and 15 (McCarthy) of Answers to Interrogatories filed 5/28/59 (Document No. 11). The other two officer witnesses will be stricken from the memo. Plaintiff has had three months to secure (and notify other counsel and the court of) a witness comparable to Mr. Keeler and he would not have been permitted to depose such an expert even if his name had been available in January 1960.

sought is prohibited by these legal principles adopted by the Federal Courts:

A. Any doubt should be decided against allowing a default where there is alleged a meritorious defense and substantial amounts are involved. See *Tozer v. Charles A. Krause Milling Co.*, 189 F. 2d 242 (3rd Cir. 1951); *Teal v. King Farms Company, supra; Alopari v. O'Leary, et al.*, 154 F. Supp. 78, 81 (E. D. Pa. 1957), and cases there cited. In the *Tozer case*, the court emphasized that a standard of liberality should be followed in setting aside default judgments in situations such as this, using this language at page 245:

> "Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. (Citing cases.) Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits. (Citing cases.) Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments. We are of the opinion that the court below applied a standard of strictness rather than one of liberality in concluding that justice did not require that the judgment be set aside."

B. Pre-trial orders may be modified even at the trial "to prevent manifest injustice." See F. R. Civ. P. 16 and *Zieliński v. Phila. Piers Co.*, 139 F. Supp. 408, 414 (E. D. Pa. 1956); *Phoenix Mutual Life Ins. Co. v. Flynn*, 171 F. 2d 982, 983 (D. C. Cir. 1948).

C. The remedy for defendant's delay in such a situation is the imposition of costs, expenses incurred in securing witnesses required by the late filing of the pre-trial memorandum, and counsel fees resulting from such late filing. See *Matheny v. Porter*, 158 F. 2d 478, 480 (10th Cir. 1946).

As indicated in Footnote 1 above, subsections C2 and C4 of defendant's pre-trial memorandum (Document No. 20) will be stricken. Cf. *Sinclair Refining Co. v. United States*, Civil Action No. 25488, Order of Judge Clary dated 9/29/60, and *Globe Cereal Mills v. Scrivener*, 240 F. 2d 330, 335 (10th Cir. 1956). Also, plaintiff may submit within thirty days an appropriate order for the imposition upon defendant of all costs, expenses and counsel fees caused by defendant's delay in filing its pre-trial memorandum. In view of the time of judicial employees of the Government wasted as a result of the late filing of this memorandum, a fine shall be paid by counsel for the defendant to the United States of America (see Standing Order of February 8, 1960).[2] Such a fine will be more substantial in subsequent cases of such long delay in filing a pre-trial memorandum, but the fact that this is the first time in the experience of the pre-trial judge that a fine has been required is being taken into consideration in this case. Also, it is suggested to opposing counsel that, in the future, their adversary should be reminded of his delinquency if defaults and other remedies are to be sought for its long continuance.

/s/ FRANCIS L. VAN DUSEN, *J.*

See order of February 23, 1961 (Document No. 28).

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2. The assertion that the court is not inconvenienced by filing such a memorandum with the Clerk the day before the pre-trial conference is inaccurate, since the trial judge in such circumstances normally would not receive the document in time to prepare for the conference. Also, consideration of this Motion, etc., has been required by this delay.

ORDER.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 24579.

JOHN GAMBLE

v.

POPE & TALBOT, INC.

v.

JARKA CORP. OF PHILADELPHIA.

ORDER SUR PLAINTIFF'S MOTION TO STRIKE PRE-TRIAL MEMORANDUM (DOCUMENT NO. 25).

(Filed Feb. 23, 1961)

AND NOW, February 23, 1961, IT IS ORDERED that:

(1) the Motion to Strike Pre-Trial Memorandum (Document No. 25) is DENIED, except that subsections C2 and C4 of that Memorandum are stricken (cf. Order of Judge Clary dated September 29, 1960, in *Sinclair Refining Co. v. United States*, Civil Action No. 25488;

(2) counsel for defendant shall pay a fine of one hundred dollars ($100.00) to the United States of America; and

(3) plaintiff may submit within thirty days an appropriate order imposing upon defendant all costs, expenses and reasonable counsel fees caused by defendant's delay in filing its pre-trial memorandum.

/s/ FRANCIS L. VAN DUSEN, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 24579.

JOHN GAMBLE

v.

POPE & TALBOT, INC.

v.

JARKA CORP. OF PHILADELPHIA.

MOTION TO STRIKE PRE-TRIAL MEMORANDUM.

(Filed December 9, 1960)

Plaintiff, by his counsel, Messrs. Freedman, Landy and Lorry, respectfully requests this Honorable Court to enter an Order striking off defendant's pre-trial memorandum, and in support thereof alleges as follows:

1. This is a maritime cause of action to recover damages on behalf of plaintiff arising out of injuries sustained by him while engaged in servicing the vessel on December 16, 1957 aboard the S. S. "P & T Voyager", a vessel owned and operated by defendant.

2. In accordance with the Standing Order of this Honorable Court adopted on October 23, 1958, relating to pre-trial conferences in other than protracted cases, plaintiff's pre-trial memorandum was filed on December 9, 1959 and two copies were mailed to counsel for defendant and counsel for third-party defendant.

3. On January 11, 1960, the pre-trial memorandum of the third-party defendant was filed.

4. Under the Standing Order adopted October 23, 1958, the defendant's pre-trial memorandum was due within 30 days following receipt of plaintiff's pre-trial memorandum or by January 11, 1960. In spite of this requirement, defendant failed to file its pre-trial memorandum until November 22, 1960, the day before the pre-trial conference in this action.

5. Defendant has failed to comply with and violated the Standing Order adopted October 23, 1960, in that its pre-trial memorandum was not filed until ten and one-half months after it was due.

Wherefore, plaintiff respectfully requests this Honorable Court to enter an Order striking off defendant's pre-trial memorandum.

Respectfully submitted,

FREEDMAN, LANDY AND LORRY,

By /s/ CHARLES SOVEL.

EXCERPTS FROM ORAL ARGUMENT.

(2) * The Court: All right, Mr. Lorry. Now, as you know, I have read the briefs. Apparently Mr. Byrne's principal objection to your position is that he says that you were not prejudiced. I take it he does not deny that some penalty ought to be inflicted for this delay, but he thinks that the matter should not be—you have read his brief.

Mr. Lorry: Yes, Your Honor.

The Court: But he feels that he should not be precluded from having the pretrial memorandum considered.

* * *

(3) The Court: Yes. Well, I agree with that. The question is, though, when you dismiss a case, when you are taking action, that that is the exact—I mean, in your case——

Mr. Lorry: Dismiss the——

The Court: —submitting a default judgment of liability, entering a default judgment of liability, that under such circumstances isn't it usual to require a showing of prejudice to enter an order which is that drastic?

Mr. Lorry: No, sir. Although I will concede that this amounts to that result. We do not ask for any entry of judgment. We ask that their pretrial memorandum be (4) stricken, and whatever follows thereafter will follow.

Now, I submit, sir, that it is not necessary to show prejudice. It has never been necessary to show prejudice in connection with any default pursuant to the pretrial proceedings. For instance, when plaintiff is barred from using a witness because, again through inadvertence, he has neglected to put the name in the pretrial memorandum, this may eliminate a large area of his damages. It may even affect the entire action.

The Court: Sure.

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* Figures in parentheses refer to page numbers of typewritten transcript.

Mr. Lorry: The defendant does not have to show prejudice. All defendant has to say is it was not in the pretrial memorandum.

The Court: Yes, but prejudice is assumed by trying to produce the witness at the last minute when you have not given notice.

Mr. Lorry: No, sir.

The Court: In other words, there is, in effect, a conclusive presumption of prejudice, see

Mr. Lorry: Well, I do not know. That has never been presented to me, because I have argued that this witness' name was given in answers to interrogatories, and yet I have been barred because the name was not in the pretrial memorandum. I have felt that the Courts wanted to make sure (5) that counsel complied with their orders with regard to the pretrial procedure, because it is an important procedure, and it is designed to help all of us.

I point out to Your Honor that in the standing order of this Court of February 8th, 1960, entitled "Imposition of Sanctions With Respect to Pretrial Procedures," the Court has stated that, "For failure to"—there are several things at a pretrial conference—"or to prepare therefor, the Court in its discretion may make such order"—and then it cites the various things it may do—including "a dismissal may be entered, or as to the defense, the preclusion of all or any part thereof, as is likewise just and proper." Nothing appears in this standing order that indicates that prejudice must be shown by either party who seeks to have sanctions interposed by reason of the failure——

The Court: Well, what do you think would be an appropriate order in this case?

Mr. Lorry: I think an appropriate order would be to strike the pretrial memorandum, sir. Now, if thereafter counsel wants to file a motion for leave to file a supplemental pretrial memorandum, then that is something else

which the Court will have to consider. We would oppose such, because this case—as a matter of fact, this case was on the list. It was No. 4 last week, and Judge Kraft put it over for one (6) week, so that Your Honor would not feel any pressure in giving fair consideration to this situation. Judge Kraft felt that it was important and that Your Honor should not feel the pressure of impending assignment for trial. When Mr. Beechwood advised Judge Kraft that this argument was outstanding and was scheduled for today—and this was just last Friday, I believe—Judge Kraft then directed Mr. Criswell to continue this case for one week until next Monday, the 27th.

This is an important situation. I feel this way, Your Honor—and I would like to speak very frankly about it——

The Court: Well, if I did what you suggest, and if there was to be any motion to file a supplemental pretrial memorandum, that would delay it even further. I mean, they would file a motion to——

Mr. Lorry: Yes, we would oppose that. We would oppose any delay in the case because of their efforts to interpose at this late date something which should have been done. I want to point this out to Your Honor: There were letters—there was a letter of transmittal with our pretrial memorandum dated December 9, 1959. There was a letter by Mr. Thompson a month later, January 11, 1960, sending the third-party's pretrial memorandum, with copies to—oh, this was to Krusen, Evans and Shaw with a copy to us. We received (7) notice two or three weeks in advance of the pretrial conference before Your Honor that a pretrial conference was scheduled, and yet not until the day before the pretrial conference was the pretrial memorandum submitted.

Now, if Your Honor felt it necessary, if you felt that prejudice was required in this situation, I am sure that we can show prejudice. I did not feel that it was necessary, and I do not feel now that it is necessary that the plaintiff,

or the moving party, should have the burden of showing that something the defendant did not do and should have done prejudiced the plaintiff before the plaintiff is entitled to sanctions.

The Court: Well, I think you are entitled to some sanctions, but I think the sanctions which you are suggesting are so drastic that you should show prejudice for that drastic a sanction, that is all.

Mr. Lorry: Well, cannot Your Honor assume prejudice, just as you can during a trial when the plaintiff calls a witness and defendant objects because his name is not in the pretrial memorandum, and the defendant's objection is sustained and the plaintiff cannot use that witness? There Your Honor says the Court assumes that there is prejudice.

The Court: Because of the fact that there is not time to do anything about it. Now, this was filed finally (8) last fall some time, and the case was not listed on the trial list until—as you say, it would have come up in February.

Mr. Lorry: The case was then on the trial list but was not reached for trial.

The Court: That is right. Well, now, that is the point I am making, that where suddenly a new witness is injected in the case at the time of the trial, then the position, as I understand it, of the Court is that the adversary has not had time to prepare for it, has not had time to make his preparation with the knowledge that that witness is going to be called, and to have other witnesses there right at the trial. Now, in this case you got their memorandum in October or November, whenever it was.

Mr. Lorry: No, sir. It was in November, I think.

The Court: November.

Mr. Lorry: Yes.

The Court: November, say. Now, that was two months prior to the trial.

Mr. Lorry: As it now develops.

The Court: That is right.

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(11) Mr. Lorry: Your Honor feels that I asked for an extreme penalty.

The Court: Yes. We want to be——

Mr. Lorry: I do not think it is so terribly extreme, but, of course, whatever Your Honor decides we will be happy to accept.

The Court: Well, I do not know what the potential damages are in this case. I would have to look it up. But as I remember it, the jury could bring back a substantial verdict.

Mr. Lorry: Yes, sir.

The Court: Now, if I strike the memorandum, it means that the case would be called for trial, the judgment of liability would be entered, and the jury would be asked to assess the damages solely on the basis of your doctors' testimony and the plaintiff's testimony as to his condition. Now that is a pretty drastic penalty.

Mr. Lorry: It is, indeed, sir. It is, indeed.

The Court: And that is the thing that causes me concern.

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(14) Mr. Lorry: The expert witness paragraph, sir, yes, sir. I think bringing in witnesses a month before we are to go to trial instead of a year before when this should have been filed, when there has been no previous indication that any expert testimony was necessary in this case, does the plaintiff real prejudice.

The Court: Well, of course, the trouble, Mr. Lorry, is that the Bar Association is constantly asking us to have these pretrials immediately before the trial, and your office

is one of the few which takes the position that the pretrial should be had fairly promptly, and offices representing both—all types of counsel feel that we ought to have these within a month of trial. Now, in other words, this is not an instrument of discovery, this pretrial.

Mr. Lorry: No, sir, but the witnesses are not named for the benefit of the Court, sir.

The Court: Well, the Court benefits by limiting the number of witnesses, limiting the issues and so on. It limits the trial. Otherwise, people get a bright idea on the eve of trial and the trial expands, takes weeks and days instead of a few days. That is one of the big advantages of these pretrial memorandums from the Court's point of view. It makes you analyze it and then list your witnesses on the basis of reason and then not suddenly get imbued by a (15) brilliant idea at the end, which often really takes a lot of time and is not worth it, that you think at the last minute it is going to be.

Now, I just know that you know that very frequently counsel do say "Expert witnesses" in such and such a field, expert neurologist. Now, I consider that improper. That is not in my view a compliance with the rule. I think you have got to put the man's name down, but frequently these pretrial memos are filed several years before the trial, certainly many months, and they will later specify on the eve of trial who the particular expert is. Now, that is a practice that has gone on here, and I think the proper way is for counsel, when they get a general designation, to promptly write and object to it. If they want to know the name of the man it is their right to write, with a copy to the Pretrial Judge, and say, "I want to know the name, who you mean by——"

Mr. Lorry: Of course, Your Honor realizes what both sides do in the present view of the situation. We list every conceivable witness who we can think of we might possibly want to use.

The Court: Sure.

Mr. Lorry: Even if we are only going to use three or four witnesses, we may have 30 witnesses down.

The Court: Just to protect you.

(16) Mr. Lorry: Yes, sir, as a protection, yes, sir.

The Court: That is right. I appreciate that this system lends itself to that multiplication of witnesses, and, on the other hand, I still think it has some advantages and certainly has some disadvantages.

Mr. Lorry: I think we would all agree with that, sir.

The Court: Mr. Byrne, do you care to say anything?

Mr. Byrne: Yes, Your Honor. I will, however, be brief. As Your Honor knows, I think, I am not the one whose inadvertence—did not file a memorandum in this case——

The Court: Yes.

Mr. Byrne: —and I, therefore, feel very free to speak my mind. It seems to me that someone is arguing another case here. It strike me, Judge Van Dusen, that really Mr. Lorry is saying that he in other cases has not liked the effect of the pretrial memorandum procedure because a witness has not been permitted to be called, for example, who was not included. But it seems to me that where a party files a pretrial memorandum listing five or six or however many witnesses and does not list one, either by inadvertence or design, and makes no attempt until the day of trial or until the case is under way to file an amendment, that you have a completely different situation than you do where obviously by inadvertence here has been a complete failure to file at all.

Now, if Mr. Lorry had wanted to take advantage of the pretrial memorandum—and I suggest that it is not for counsel's assistance that the Court required their filing—he had many months in which he could have called the at-

tention of the attorney for the defendant here to the inadvertent omission, and I do not think that he can now be heard to say, "Well, I sat back for five or six or eight or nine months and mousetrapped the opposing counsel and now I want to take advantage of it," and the Court should assume prejudice. I do not think, first of all, that the pretrial conference memorandum is for anyone else's aid but the Court, and I think that when you look at Federal Rule 16, under which you must necessarily be operating, that you cannot read into it any benefit intended to be for the plaintiff, or one of the parties, and I think that Mr. Lorry, when he argued to you a moment ago, indicated that one of the purposes which he thinks is a legitimate purpose of the pretrial memorandum, he said so they could locate and interview the witnesses listed in the memorandum.

Now, I suggest, sir, that is not a proper function. If you need discovery, you use the discovery rules, and that that is not the function of the pretrial conference memorandum, to give your opponent inside advices as to which witnesses you are going to call so that they may thereby go seek them and interview them.

Now, I do want to call the attention of the Court to a decision which I have found which seems to be very, very much on point. The case is Matheny v. Porter, and it is in 158 Federal 2nd at 478, and the point under discussion is at 480. Now, in that case in lieu of a formal pretrial memorandum there were letters, and the letters were specifically directed by the Court at the pretrial conference to be passed between the parties. When the case came on for trial, the District Court refused—it gave practically the same relief for which the plaintiff is now asking in this case. And when it went up on appeal, it was reversed on other grounds, but the Court of Appeals, in commenting upon this, used exactly the same terminology that Your Honor spontaneously used a few moments ago, and it said, "The withdrawal from the defendant of the right to introduce any evidence in his own behalf bearing upon the issues of fact in the case seems drastic."

I think that this would be a perversion of the function of the local rule requiring pretrial memoranda. It is intended for the aid of the Court. It is not a substitute for discovery. And I think that the arguments that simply because you have a rule and there has been an inadvertent omissi[illegible] connection with it, should not put a weapon in the hands of an adversary party, because, of course, an adversary will use any weapon he may. I do not blame Mr. Lorry for using weapons that the Court puts in his hands. It is a question of whether the Court should permit him to use a rule intended for the aid of the Court to become an adversary weapon.

Mr. Lorry, having had this pretrial conference memorandum before the pretrial conference, and at least three months before trial, I can hardly see where there can be any prejudice.

Mr. Lorry: May I say one word, sir?

The Court: Certainly.

Mr. Lorry: If Mr. Byrne's position is true, that this memorandum is for the benefit of the Court only, then I do not see how either party would ever have the right to object at the time of trial because a witness was not named in the pretrial memorandum.

Furthermore, Mr. Byrne indicates that we have, as he puts it, mouse-trapped the defendant by letting him continue blissfully unaware for 10½ months that his pretrial memorandum was not filed. I say to Your Honor that there is not and never has been any affirmative duty on the part of either counsel to shake up his oponent and say "You are not (17) complying with the rules." I do not know of any defendant who has ever said to me "You better file a complaint because the statute has run." No, they let me file the complaint and then move to dismiss it because the statute has run. This is even though we have correspondence. I do not know of any defendant who has ever said "I don't think you made good service in this case and

we are going to move to dismiss for lack of venue. You better make good service." No, they wait until the statute has run and then move to dismiss. Now, I do not say this critically, but I say that there is no burden of duty on the part of me or any other attorney to alert the opponent to his errors. A client is stuck with the counsel he gets, and if counsel errs, the client, unfortunately, has to pay the penalty. That is what our system is based on.

I ask here that Your Honor exercise what we deem is fair justice and provide whatever sanctions the Court feels are fair in this situation. But I do ask Your Honor not to, in the exercise of your judgment, not to do it with—not to personalize it, not to enter any fines against counsel, because this, I think is unfair.

The Court: Well, I appreciate your request, Mr. Lorry, and I will take it into consideration, but, of course, I feel that Mr.—counsel for the defendant—I will not personalize it by referring to Mr. Byrne, because he is (18) not involved, he is not the counsel in this case—has required at least that you come down here, and I may not overlook that.

Mr. Lorry: No, sir, but——

The Court: This argument has been necessitated; and everybody knows that it costs money to prepare briefs, as you have had to do here, and to present argument. A lawyer has only his time.

Mr. Lorry: Yes, sir.

The Court: And I would feel that I must take that into consideration in whatever I do.

Mr. Lorry: But I am only seeking to serve my client in so moving, sir. I am not seeking to benefit personally, and if Your Honor exercises your judgment in assessing fines against counsel in this kind of situation I feel that counsel does not get the benefit of his actions as leaders and alert counsel are entitled to get, and the other side is

truly penalized, but the result is not what is warranted by the situation.

The Court: I will have to study the cases. Neither of you have gone into great detail on showing when parties are entitled to relief from the pretrial requirements. Now, my memory is—and I say this very hesitantly, because I have not looked this up for many years—but my memory is (19) that there are cases by our own Third Circuit which say that the pretrial rules are never to be used when it is going to defeat substantial justice and securing the facts. Now, I think there are cases on that.

Mr. Lorry: I wish I heard something like that during trial, sir. I never heard anything said like that during any trial in which the defendant objected to a witness because his name was not in the pretrial memorandum, even though it deprived the Court and the jury of hearing an essential part of the case.

The Court: I think that is quite different, because I think there you have got no chance to prevent yourself—now, as I say, this is just a feeling, based on decisions which I believe I have read several years ago when a point very similar to this came up.

Mr. Lorry: I will certainly search for these cases, sir.

The Court: Of course, if I am correct, that there is a Third Circuit decision along that line, I will consider I would normally be bound by it, but I——

Mr. Lorry: But you pointed out that the Court entered a standing order just last year——

The Court: Oh, I am very familiar with that standing order. I helped draft it, and I am quite cognizant (20) of the fact that we have broad powers, and it was drawn just to meet situations like this. It was drawn to meet situations so that penalties could be imposed on the defendants as well as the plaintiffs, and we felt that without that we

were limited on what we could do to a defendant, and that was the reason why we drew that rule, and it was based on the New Jersey State Court pretrial rules. We expanded it so much but the basis of it was a rule in the New Jersey Court concerning sanctions in pretrial matters, and I am very familiar with that, and I appreciate your calling it to my attention, because I might not be, but I just happen to be familiar with it. Thank you, gentlemen, very much.

Mr. Byrne: May it please the Court, may I say one thing? I do not want to seem to be complaining, and I am not—I simply would draw to your attention the fact that it was the practice of the Office of the Clerk when a party was not on schedule with the filing of a pretrial memorandum to send him a very threatening "I will hit you over the head" notice, and there was no such notice in this case. Now, we are not entitled to rely on the Clerk; that I know, and I do not urge that it was the Clerk's error here. It is simply a circumstance which I think you may consider.

The Court: Well, I may, but any practice such as that which the Clerk follows cannot be relied on unless we have it in the standing order,——

Mr. Byrne: That I understand.

The Court: —a standing order saying the Clerk will do certain things, and in that case I think you are entitled to rely on it; but in any other case I do not think you are.

Mr. Byrne: I did not say that we were.

The Court: Thank you, gentlemen.

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,578

JOHN GAMBLE

v.

POPE & TALBOT, INC.

v.

JARKA CORP. OF PHILADELPHIA

APPEAL OF TIMOTHY J. MAHONEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 13, 1961

Before BIGGS, *Chief Judge* and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE and SMITH, *Circuit Judges.*

Opinion of the Court

(Filed July 20, 1962)

By MCLAUGHLIN, *Circuit Judge.*

On April 24, 1958, John Gamble, a longshoreman, commenced a personal injuries action in the United States District Court for the Eastern District of Pennsylvania against Pope & Talbot, Inc., a shipowner. On September 22, 1959, the latter with leave of court impleaded Jarka Corp. of Philadelphia, the stevedoring company which had

employed Gamble. The case was tried in March of 1961 resulting in verdicts in favor of Gamble against Pope & Talbot with indemnity in favor of the latter against Jarka Corp. The merits of the litigation are not before us. Our problem is solely concerned with pretrial procedure.

In effect in the United States District Court for the Eastern District of Pennsylvania are two "standing orders" which provide as follows:

"PRE-TRIAL CONFERENCES IN OTHER THAN PROTRACTED CASES

(Adopted October 23, 1958)

"1. The Clerk of the Court shall list for pre-trial all civil cases which have been answered for trial on the Jury and Non-Jury Preliminary Call lists. The filing of a pre-trial memorandum by all counsel is mandatory. * * *

* * * * * * *

"2. * * * Not later than 30 days after the publishing of said [civil pre-trial] list, counsel for plaintiff shall file a written pre-trial memorandum with the Clerk of the Court and serve two copies on all other counsel of record.

"Within 30 days of receipt of such pre-trial memorandum, all counsel served with plaintiff's memorandum shall file a written pre-trial memorandum with the Clerk of the Court and serve two copies on all other counsel of record. * * *

"Plaintiff's pre-trial memorandum shall contain the following:

* * * * * * *

"C. The names and addresses of all witnesses (except rebuttal) whom the plaintiff expects to call to testify at the time of trial. * * *

* * * * * * *

"Defendant's counsel shall also include in his pre-trial memorandum the same material pertaining to defendant's case as required of plaintiff in paragraphs C, * * *.

"IMPOSITION OF SANCTIONS WITH RESPECT TO PRE-TRIAL PROCEDURES

(Adopted February 8, 1960)

"For failure to appear at a pre-trial conference, or to participate therein, or to prepare therefor, the Court, in its discretion, may make such order with respect to the imposition of fines, costs and counsel fees, as is just and proper; with respect to the continued prosecution of the cause (complaint, cross-claim or counterclaim), a dismissal may be entered, or as to the defense, the preclusion of all or any part thereof, as is likewise just and proper."

In compliance with the October 23rd standing order, counsel for the plaintiff and third-party defendant filed their pretrial memoranda with the court and served their adversaries with the required copies. The defense memorandum was not filed until the day before the pretrial conference. It was more than ten months overdue. There is no question but that counsel's lapse was unintentional. After receiving regular notice from the court clerk of the pending pretrial conference, he reviewed his file, caught the omission, and then proceeded to prepare a full memorandum.

On December 8, 1960, leave having been granted at the pretrial conference, counsel for the plaintiff filed a written motion to have the court strike the untimely memorandum. Thereafter the court filed a memorandum opinion and order denying the motion as too drastic in the circumstances but, in view of the long though unintentional delay, (1) struck the names of certain proposed witnesses appearing on the memorandum thereby precluding the defendant from calling them as witnesses at the trial; (2) imposed

upon the defendant's counsel "a fine of one hundred dollars" payable to the United States; and (3) permitted the plaintiff to "submit within thirty days an appropriate order imposing upon defendant all costs, expenses and reasonable counsel fees caused by defendant's delay in filing its pre-trial memorandum." The trial was held with the results as stated.

Viewing the imposition of the fine upon him as carrying "the criminal hallmark", defendant's counsel filed a notice of appeal in compliance with the Federal Rules of Criminal Procedure (and thus well within the time requirement of the Federal Rules of Civil Procedure). He captioned the appeal in the original cause and did not name an appellee. At his request, the clerk of the court served a copy of the notice of appeal upon the United States Attorney. The latter has neither appeared nor filed a brief. Leave was granted John J. Dautrich, Esq. to appear as amicus curiae in opposition to appellant's position.

The issue is whether the district court has the power to fine counsel for a party engaged in private civil litigation for not complying with the "standing orders" of the court. Appellant does not here question the district court's action in striking the names of the proposed trial witnesses contained in the memorandum. It is also noted that plaintiff has not submitted a proposed order covering financial remuneration for defendant's delay.

The district court justified the imposition of the fine by saying that:

> "In view of the time of judicial employees of the Government wasted as a result of the late filing of this memorandum, a fine shall be paid by counsel for the defendant to the United States of America (see Standing Order of February 8, 1960). Such a fine will be more substantial in subsequent cases of such long delay in filing a pre-trial memorandum, but the fact that this is the first time in the experience of the pre-trial judge that a fine has been required is being taken into con-

sideration in this case. Also, it is suggested to opposing counsel that, in the future, their adversary should be reminded of his delinquency if defaults and other remedies are to be sought for its long continuance."

Appellant's contention is that the district court has not been given authority and possesses no inherent power to fine an attorney who has not been held in contempt nor given a hearing. We must agree.

The trial judge did not regard the attorney's default as constituting contempt of the court; he did regard it as falling within the sanction of the standing order. The contempt designation was nowhere used in the order appealed from or in the standing order. There were no formal contempt proceedings. Appellant suggests that the court's action in fining him "had to be contempt or it was nothing." Amicus urges that it was "• • • simply • • • an exercise of disciplinary authority, with no necessary criminal connotation." He further asserts that "• • • it certainly may not be assumed that Congress intended • • • [by the contempt statute, 18 U.S.C.A. § 401, 62 Stat. 701] to destroy or limit the separate and distinct power of courts to discipline their attorneys in matters not constituting contempts."

However it be called the effect was to punish defendant's attorney for contempt in failing to file the defense pretrial memorandum within time. Amicus does not point to and we cannot find any authority for it. There is nothing in the Federal Rules which authorizes sanctions in the form of penalties to be imposed upon an attorney in a civil litigation.[1] To impose such a penalty for conduct not found to be

1. 28 U.S.C.A. § 1927 provides that "Any attorney • • • in any court of the United States • • • who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs." This section is applicable only when excess costs are shown to exist. The costs are not payable to the United States as a fine, but may be payable to the United States as a party litigant whose costs were increased

contemptuous and without the procedural safeguards given by Rule 42 of the Federal Rules of Criminal Procedure violates the Fifth Amendment.

Amicus next contends that even if the Federal Rules do not give explicit authority to the district court, Rule 83 of the Federal Rules of Civil Procedure, authorizing the district court "to make and amend rules governing its practice not inconsistent with these rules * * *" is an appropriate source of power. With an admiralty cause involved here both Rule 83 and its admiralty counterpart, Admiralty Rule 44, are applicable. Although they are an "affirmative grant of authority", see Miner v. Atlass, 363 U.S. 641, 647 (1960); cf. United States v. Hvass, 355 U.S. 570, 575 (1958), still the local rule making power, while not limited to the trivial, cannot extend to basic disciplinary innovations requiring a uniform approach. Whether an attorney should be himself fined when, because of office oversight or neglect, he is late in complying with an order of the court is a substantial independent question which calls for mature consideration by the body charged with making Rule recommendations, the Supreme Court's advisory committee. See 28 U.S.C.A. § 331; Miner v. Atlass, supra at 649-650.

Absent authority, the district court's power to penalize appellant is limited by the contempt statute, 18 U.S.C.A. § 401, and by Rule 42 of the Federal Rules of Criminal Procedure. Section 401 permits the district court to impose fines only for specified conduct enumerated therein. If the conduct does not fall within the statute, it has no such power. That problem does not arise in this appeal as there is no indication that the contempt statute was being invoked, and Rule 42 was not followed.

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by virtue of the attorney's conduct. See Weiss v. United States, 227 F.2d 72 (2 Cir. 1955), cert. den. 350 U.S. 936 (1956); Motion Picture Patents Co. v. Steiner, 201 Fed. 63 (2 Cir. 1912). While the district court points out that the time of judicial employees was "wasted" by appellant's oversight, this is of no moment in determining costs under this section.

We stress that this is an ordinary pretrial procedure case. It is not a cause célèbre. It should be kept headed into the wind. It furnishes no need or reasonable excuse for some collateral defense of pretrial practice. The latter has long since been generally accepted by both courts, federal and state, and attorneys. The Eastern District of Pennsylvania, one of the largest (in volume) and busiest in the nation, has been a leader in establishing work-a-day pretrial methods that, despite woeful lack of judge power through the years, have been of most material assistance in properly handling an enormous trial list. This would not have been possible without the devoted, constant, expert use of them by all of the judges in the district. And the smooth, satisfactory operation of the system would not have been possible without the sincere cooperation of the bar. Both court and counsel recognize that pretrial is an integral, necessary element of litigation. It is doubted that anyone affected would now willingly revert to the litigation practice as it was prior to the adoption of today's methods.

On occasion there is a slip up. Almost always it is no more than that, as in the involved instance. Usually it occurs where a date is not entered, or perhaps not carried over, or is erroneously noted; sometimes where a paper or letter is filed prematurely and forgotten until some independent reminder brings it to light. Judges are not customarily plagued with that sort of incident themselves though it has taken place with them too. Lawyers are not so fortunate. When it happens, they are embarrassed and troubled. In good faith they do what can be done to make amends. As long as a lawyer practices, once in a great while, he will be haunted by the thought that he missed a filing date. His primary distress is not over punishment but that he has neglected a duty. No matter what might be the office situation, the responsibility is his and he assumes it.

Judges know this. While they rightly demand and receive full compliance, they are mostly patient and understanding. In instances when their judgment is that affirma-

tive action should be had in a particular set of circumstances, it is taken. Ordinarily there is nothing personal about it. In the case at bar it was the delay that was being punished, irrespective of its cause. The means employed were beyond the power of the court but the incident did serve to point up the importance of counsel meticulously observing pretrial filing date obligations. In so doing it fulfilled the commendable purpose of the trial judge i.e. to vividly bring to the attention of the entire Eastern District bar that substantial negligence in pretrial practice will not be tolerated. But that commendable purpose with its innocent but palpably erroneous assumption of dictatorial powers over litigation, lawyers and litigants, should not now be seized upon as an opportunity to further the questionable cause of reducing lawyers in a courtroom or within its reach to puppets, completely subject to the whim and warp of the courts.

We are not dealing with the caponizing of a judge. It is not his independence that is being protected by the minority view. What the latter is doing is supporting the tactic of informally inflicting a criminal sanction without charges or hearing; where there was no "actual obstruction of justice"[2] and where counsel belatedly remedied but nevertheless remedied his unfortunate negligence and where the plaintiff's cause was not harmed. What the minority view really attacks is our "vigorous, independent bar".[3] What it really advocates is the complete take over of the trial and its collaterals by the trial judge and appellate courts. It is good to have this out in the open where it can be squarely faced. The effort to concentrate all that frightening power in the bench is too dangerous a potential to let slip by clothed in such disarming language as "simply * * * an exercise in disciplinary authority, with no necessary criminal connotation". All that "exercise" happens to be is the first giant step in stripping a lawyer of his independence and leaving him, his client and the latter's

2. In Re McConnell, U.S. (1962).
3. In Re McConnell, U.S. (1962).

cause of action to the ukase of the court. Even Jack Cade's solution would have left the lawyer his self-respect.

That the trial court's act should be urged as justified by some sort of judge-made law makes it doubly abhorrent. Kept within its proper bounds the district court decision is merely a mistake, to be corrected in stride. Given the motivation attributed by the minority to the principle involved, it is an ominous doctrine that should be buried deep and forgotten.

Paragraph (2) of the order of the district court of February 23, 1961, which is the only part of said order from which appeal has been taken, will be reversed. The case will be remanded with instructions that judgment be entered in favor of appellant (counsel for the defendant) on paragraph (2) of said order.

HASTIE, *Circuit Judge, concurring in result.*

I agree that the court below, although acting with the best intention, has exceeded its power by imposing a criminal sanction without legislative authority for conduct which did not amount to contempt of court. Accordingly, I concur in the reversal of the challenged part of the order of the district court. However, the principal opinion includes references to the contrary position in which I do not join.

Judge Kalodner joins in the foregoing.

BIGGS, *Chief Judge,* dissenting.

I regret that I cannot agree with the majority opinion. I do agree that the issue is whether a United States district court has the power to "fine" or impose a sanction on counsel for a party engaged in private civil litigation because the attorney [1] has not complied with a "standing order" or

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1. In the notice of appeal, opposite "Name and address of Appellant," has been set out not only the name of Timothy J. Mahoney, Esq., the member of the bar of the court below who failed to comply with the standing order in question, but also the other partners of

rule of the court requiring him to file a timely pretrial memorandum. The majority strikes down the fine on the ground that the court has not been given the authority and possesses no inherent power to impose upon counsel what, in the majority's view, is a penalty for criminal contempt.

There were in fact no formal proceedings before the penalty was imposed on the appellant. There was a hearing on a motion by the plaintiff to strike the late pretrial memorandum, and there was discussion of a range of possible sanctions including fines on counsel. The trial judge deemed the striking of the memorandum to be too drastic a penalty and instead imposed upon the tardy attorney the fine appealed from. The distinguished counsel serving as *amicus curiae* takes the position that the action of the court below was "simply . . . an exercise of disciplinary authority, with no necessary criminal connotation." I agree with this statement.

The United States District Court for the Eastern District of Pennsylvania is one of the busiest in the federal system. At the end of the fiscal year 1961, it had pending over 4000 civil cases,[2] the type of litigation most difficult to dispose of and more time-consuming than any other. A high degree of cooperation between bench and bar must be secured if calendar control and prompt disposition of these civil cases are to be effected.

That high degree of cooperation has, in general, been attained. The great majority of members of the bar join with the judges in vigorous and sincere efforts to bring the

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Messrs. Krusen, Evans and Shaw. The "Statement of Judgment" appealed from is "The Order of the United States District Court for the Eastern District of Pennsylvania (Francis L. Van Dusen, Judge) entered February 23, 1961, sentencing the Appellant Mahoney or possibly all of the partners *trading as Krusen, Evans & Shaw* as more fully set out in the said Order of February 23, 1961." The form of the appeal is mentioned at a later point in this opinion. For the purposes of this opinion, Timothy J. Mahoney will be treated as the appellant.

2. See Table C 1, Annual Report of the Director of the Administrative Office of the United States Courts, 1961.

congested dockets up to date. But a few attorneys are habitually dilatory. The often unconscious mental attitude of this small group contributes substantially to calendar congestion. It is the banal but brutal fact that justice delayed is justice denied.

For many centuries it has been the practice to impose the shortcomings of the counsel upon the client. When a required pleading, for example, has not been filed in time or default has been incurred by reason of the failure of counsel to perform his duty, it has been usual to impose costs or some other penalty upon the party and not on his counsel.[3] This seems as unrealistic as imposing a penalty on a passenger because the railroad train on which he rides is late because of the dereliction of the operating crew.

Here we are concerned specifically with procedures relating to the pretrial conference. I think the great value of such conferences in aiding the speedy disposition of civil cases cannot be seriously questioned. As was said in Link v. Wabash R.R., 291 F. 2d 542, 547 (7 Cir. 1961), aff'd, — U.S. — (1962):

> "Pre-trial procedure has become an integrated part of the judicial process on the trial level. Courts must be free to use it and to control and enforce its operation. Otherwise, the orderly administration of justice will be removed from the trial court and placed in the hands of counsel. We do not believe such a course is within the contemplation of the law."

In Link the action was dismissed because of the failure of the plaintiff's counsel to attend a pretrial conference. The sanction—a most severe one—was visited on the party

3. Congress has broken through this band of illogic by enacting 28 U.S.C. § 1927, which provides, as the majority points out, that "any attorney . . . in any court of the United States . . . who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

plaintiff rather than on his counsel. See also Payne v. S.S. Nabob, — F. 2d — (3 Cir. 1962).

To the end that pretrial might be carried on effectively in the court below, the first of the "standing orders", that of October 23, 1958, set out in the majority opinion, was adopted. As I understand it, the majority does not doubt, nor the appellant question, the power of the district court to make such an order. In Padovani v. Bruchhausen, 293 F. 2d 546, 548 (2 Cir. 1961), Judge Clark points out that the purpose of Rule 16 of the Federal Rules of Civil Procedure is to enable the court to call a conference to *prepare* for trial—that is, *the* pretrial conference. Rule 83 authorizes the district courts to make rules governing their practice "not inconsistent" with the Federal Rules of Civil Procedure. Certainly the first standing order recited in the majority opinion is consistent with Rule 16. It is not, in my opinion, an effective disposition of the contention of *amicus* to hold that the standing order is not the equivalent of a rule of court. This argument is based on an unappealing technicality.

Dealing now with the second standing order of the court below, that of February 8, 1960, under which the sanction on counsel was imposed, that also has the validity of a rule of court made pursuant to Rule 83. It is a reasonable exercise of the authority given district courts by the Supreme Court in accordance with that Court's rule-making power under the Act of June 19, 1934, 48 Stat. 1064. True, the impact of the sanction is shifted from the party to his attorney but it seems to me to be the better rather than the worse for this reason. The argument of the majority that the power of the district court to make the standing order should not have been exercised because the result would be a lack of uniformity throughout the districts overlooks the fact that there is no pressing need for uniformity in respect to pretrial conferences. Some courts are not troubled with congested dockets; others are. Indeed, if uniformity were a goal in itself Rule 83 would

serve no purpose at all. The Rule serves to reserve to the respective district courts a large degree of local judicial autonomy in rule-making and provides for wide variations in administrative practices among them. It is clear to me that the standing orders of the district court do not conflict but rather are in harmony with the Federal Rules of Civil Procedure.[4]

Assume, however, that a United States District Court gains no authority under the Federal Rules of Civil Procedure to establish the standing order of February 8, 1960, under which the penalty was imposed upon the tardy counsel. I conclude nevertheless that the district court possesses the inherent power to make both standing orders, the last as well as the first. The conception of a court helpless to control its calendar is a hopeless one.

The power of a court to discipline members of its own bar can scarcely be doubted seriously. An attorney is under no obligation to seek admission to the bar of a United States district court. He is at liberty to abstain from membership in that or any other bar. But when he does apply and is admitted he secures certain privileges and also assumes definite obligations.

The power of a court to impose appropriate and reasonable sanctions upon those admitted to its bar is a

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4. The appellant places great emphasis on Miner v. Atlass, 363 U.S. 641, 648 (1960), but I cannot perceive in that decision support for his contention that the standing order is invalid as being inconsistent with the Federal Rules of Civil Procedure. The failure of the Federal Rules to provide for the details of pretrial procedure affords no basis under the Miner case for the assertion that the field is preempted. Mr. Justice Harlan, speaking for the Court in Miner, seems to concede that the failure of the Supreme Court to include discovery depositions in the admiralty rules did not disclose the intention *per se* to foreclose the district courts from adopting appropriate local rules under the admiralty equivalent of Rule 83 of the Federal Rules of Civil Procedure. In addition, the Court disclaimed all intention of deciding that, whenever the rules dealt with part but not all of a subject, the practices not provided for may not be dealt with by local rules. The Supreme Court stated: "We deal here only with the procedure before us, and our decision is based on its particular nature and history." 363 U.S. at 649.

familiar phenomenon and lies within the inherent power of any court of record. Typical of that power is the authority of a court to grant a new trial of its own motion, to dismiss a complaint for want of prosecution [5] or in order to effect the ends of justice,[6] to invoke the aid of an auditor,[7] to call for a pretrial conference,[8] to protect a litigant against costs created by his counsel,[9] and to make rules,[10] in addition to the power to discipline members of the bar.[11]

When we look at the disciplinary problem presented by the appellant, we perceive at once the reason—indeed, the necessity—for a standing order of the sort here under discussion authorizing the imposition of a penalty upon him. The facts are not in dispute. The case appeared on the civil pretrial list published in the autumn of 1959. The plaintiff filed his pretrial memorandum on December 12, 1959. The pretrial memorandum of the defendant, represented by this appellant, was due under the standing order [12] first quoted in the majority opinion on January 11, 1960. The appellant had received a letter from the plaintiff dated December 9, 1959, accompanying the latter's pretrial memorandum and had received a letter accompanying the third-party defendant's pretrial memorandum on January 11, 1960.[*] Approximately two weeks prior to November 23, 1960, the appellant received the usual formal notice,

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5. Hicks v. Bekins Moving & Storage Co., 115 F.2d 406 (9 Cir. 1940).

6. United States v. Apex Distributing Co., 270 F.2d 747 (9 Cir. 1959).

7. Ex parte Peterson, 253 U.S. 300, 314 (1920).

8. Fanciullo v. B. G. & S. Theatre Corp., 297 Mass. 44, 8 N.E.2d 174 (1937).

9. Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 Fed. 350 (6 Cir. 1915).

10. State ex rel. Hawke v. LeBlond, 108 Ohio St. 126, 140 N.E. 510 (1923).

11. In re Schlesinger Appeal, 404 Pa. 584, 629, 172 A.2d 835, 856 (1961), cases cited in dissenting opinion.

12. It is interesting to note that the appellant in his main brief in this court refers to the standing order providing the terms and conditions for pretrial conferences, that of October 23, 1958, as a "rule".

sent by the clerk of the court, that the pretrial conference would be held on November 23, 1960. The appellant disregarded all these warning notices "through inadvertence". The defendant's pretrial memorandum, finally prepared by the appellant and filed about ten months late, was received by the trial judge the night before the pretrial conference. The trial of the case was delayed approximately three weeks and might have been delayed longer had not the trial judge proceeded vigorously and promptly despite the appellant's tardiness. See 191 F. Supp. 763 (1961).

The appellant, for obvious reasons, desires to give the proceedings a criminal cast. He asserts that the appeal has been taken pursuant to the Federal Rules of Criminal Procedure and uses the word "sentencing" to characterize the order appealed from. But how the appellant chooses to describe his appeal is, in my opinion, not important; the notice of appeal should be viewed, I think, as sufficiently broad to authorize this appeal whether it is civil or criminal. What is important, however, is that these proceedings are of a different nature from those for criminal contempt. The power to discipline springs from a different source than does the power to punish for criminal contempt. See 18 U.S.C. § 401. The appellant's dereliction did not amount to contempt. The trial judge treat the failure to file the pretrial memorandum—annoying as it was and, if repeated frequently, destructive of the judicial process—as a peccadillo rather than a sin. There is no suggestion of wilfullness, a necessary element of contempt,[13] on the part of the appellant. And since, for these

[13] See *e.g.*, United States *ex rel.* Porter v. Kroger Grocery & Baking Co., 163 F.2d 168 (7 Cir. 1947); Uhler v. Superior Court, 117 Cal. App. 2d 147, 255 P.2d 29 (1953); Lamm v. Lamm, 229 N.C. 248, 49 S.E.2d 403 (1948); Raszler v. Raszler, 80 N.W.2d 535 (N.D. 1956); State v. Yates, 208 Ore. 491, 302 P.2d 719 (1956); Long v. McMillan, 226 S.C. 598, 86 S.E.2d 477 (1955). See also *Daniel, Contempt* § 171. And Bouvier's Law Dictionary (Rawle's 3rd rev.) states that "contempt" is "a wilful disregard or disobedience of a public authority."

reasons, I do not view this as a contempt proceeding, the recent ruling of the Supreme Court in *Ex parte* McConnell, — U.S. —, construing 18 U.S.C. § 401, has no application here.[14]

In conclusion, I point out that the delays of the offending counsel were freely admitted by him. The two standing orders of the district court gave him ample notice and permit the raising of no valid issue as to due process.

I would affirm the order of the court below.

GOODRICH, *Circuit Judge*, Concurring in Dissent.

It seems to me that the position taken by the Chief Judge is clearly right. It is true that the "inferior courts" spoken of in the Constitution are courts of limited jurisdiction. But because a court has authority to deal with only specified types of cases or controversies does not mean that the judge of such a court is caponized. So far as the things he deals with are concerned, he has the authority, surely, of any judge in any court of record.

No one doubts that the judge has authority to run his court. He may tell counsel to sit down; he may have removed from the room persons who interfere with the proceedings. He sets dates for argument. Court is opened and adjourned at such times as he specifies. He certainly is not less in control of his courtroom than is a teacher in control of his classroom.

Now the judge may also discipline the members of the bar of his court and, in cases calling for it, may suspend

14. The writer of this opinion was at first somewhat troubled by the use of the phrase "and none other" in Section 401, Title 18, U.S.C., since it seems to prohibit any fine imposed by a court of the United States except upon conviction of a crime, which in this instance, says the appellant, can be only the crime of criminal contempt, if there be a crime at all. But in my view the phrase quoted modifies the whole of the sentence and not merely the word "power". It would follow that the words of restriction are not applicable under the circumstances at bar.

them or punish them for contempt. It seems to me clear that with all this authority which the judge undoubtedly has that he can also impose sanctions for the disciplining of lawyers who, in matters not amounting to contempt, do not obey rules. If a judge is going to organize, either alone or with fellow judges, the business of the court, there must be authority to impose reasonable sanctions for the breach of reasonable rules.*

* The court, following Judge Goodrich's death on June 25, 1962, ordered this opinion, Concurring in Dissent, filed.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,578.

JOHN GAMBLE

v.

POPE & TALBOT, INC.

v.

JARKA CORP. OF PHILADELPHIA,

APPEAL OF TIMOTHY J. MAHONEY, ET AL.

PETITION FOR LEAVE TO INTERVENE AS PARTIES APPELLEES.

(Filed July 27, 1962)

AND NOW, this 27th day of July, 1962, the United States District Court for the Eastern District of Pennsylvania and its members, including the Honorable Thomas J. Clary, Chief Judge, and the Honorable Francis L. Van Dusen, the Judge who entered the order of February 23, 1961, involved in the above-captioned appeal, through their attorney, respectfully move the Court to enter an order, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, permitting them to intervene as parties appellees; and in support of this petition aver the following:

1. The within matter arises on appeal from an order of the United States District Court for the Eastern District of Pennsylvania by Judge Francis L. Van Dusen, dated February 23, 1961, imposing a fine payable to the United States of America upon the attorney for the defendant in that Court for failure to comply with a Standing Order of the

said Court relating to pre-trial procedures, said attorney being the present appellant.

2. Neither the United States District Court for the Eastern District of Pennsylvania, nor the members thereof, including the Judge who entered the order dated February 23, 1961, was a party to the original civil action in the course of which the order appealed from was entered; neither were the Court nor its members named respondents in the appeal taken from the order.

3. The United States Court of Appeals for the Third Circuit filed its Opinion and Order, with two Judges dissenting, in the above appeal on July 20, 1962, holding that the Judges of the United States District Court for the Eastern District of Pennsylvania had no power to impose a fine of $100.00 on an attorney whose negligent delay in filing a pre-trial memorandum interfered with the administration of justice in their Court in a case where his adversary had refused attorney's fees, expenses, or any relief except for entry of a default judgment against the client represented by the attorney whose negligent delay had interfered with the administration of justice.

4. The aforesaid Opinion and Order has affected adversely the United States District Court for the Eastern District of Pennsylvania and its members, and binds them insofar as it proscribes their future utilization of a method of seeking compliance with a Standing Order of the Court with respect to pre-trial procedures.

5. The parties to the original civil action and the appellant in the appeal taken therefrom do not and did not represent the interests of petitioners in the administration of justice affected by the Opinion and Order of the Court of Appeals.

6. Under 28 U. S. C. § 1254(1), writs of certiorari may only be granted by the Supreme Court of the United States upon the petition of a "party" and to seek relief from the

aforesaid Opinion and Order, the United States District Court for the Eastern District of Pennsylvania and its members must therefore become parties to this litigation.

WHEREFORE, it is respectfully requested that an order be entered granting the above Petition for Leave to Intervene and making the United States District Court for the Eastern District of Pennsylvania, including Chief Judge Thomas J. Clary, Senior Judge William H. Kirkpatrick, Senior Judge Allan K. Grim, Judges John W. Lord, Jr., Francis L. Van Dusen, C. William Kraft, Jr., Harold K. Wood, Abraham L. Freedman, Alfred L. Luongo, and Ralph C. Body,[1] parties appellees as of July 19, 1962 in the above-captioned action.

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1. Vacation schedules have made it impossible to reach Senior Judge George A. Welsh and Judge Joseph S. Lord, III.

JAMES ALAN MONTGOMERY, JR.
James Alan Montgomery, Jr.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,578.

JOHN GAMBLE

v.

POPE & TALBOT, INC.

v.

JARKA CORP. OF PHILADELPHIA,

APPEAL OF TIMOTHY J. MAHONEY, ET AL.

ANSWER TO PETITION FOR LEAVE TO INTERVENE AS PARTIES APPELLEES AND PETITION FOR STAY OF MANDATE.

(Filed August 1, 1962)

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

The members of the firm of Krusen Evans and Byrne do not desire to enter into litigation with the Judges of the United States District Court for the Eastern District of Pennsylvania before whom they practice. They do not oppose either the petition for leave to intervene as parties appellees or the petition for stay of mandate filed by counsel representing the Judges of the District Court if this Court should conclude that it has the power and jurisdic-

tion to grant the prayers of the petitions; that F. R. C. P. 24(a)(2) governs procedure in the Court of Appeals; and that an order as prayed for in the petition would create a "case or controversy" between the Judges of the District Court and the appellants.

Respectfully submitted,

T. E. Byrne, Jr.,
T. E. Byrne, Jr.,
Krusen Evans and Byrne,
Attorneys for Appellants.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 13,578

JOHN GAMBLE

v.

POPE & TALBOT, INC.

v.

JARKA CORP. OF PHILADELPHIA

APPEAL OF TIMOTHY J. MAHONEY, ET AL.

ORDER.

(Filed August 4, 1962)

The application of the United States District Court for the Eastern District of Pennsylvania and Chief Judge Thomas J. Clary, Senior Judge William H. Kirkpatrick, Senior Judge Allan K. Grim and Judges John W. Lord, Jr., Francis L. Van Dusen, C. William Kraft, Jr., Harold K. Wood, Abraham L. Freedman, Alfred L. Luongo and Ralph C. Body thereof, to intervene as parties appellees in this cause is granted.

By THE COURT,

McLAUGHLIN,
Circuit Judge.

Dated: August 3, 1962.

APPENDIX C.

PRE-TRIAL CONFERENCES IN OTHER THAN PROTRACTED CASES.

Adopted October 23, 1958.

1. The Clerk of the Court shall list for pre-trial all civil cases which have been answered for trial on the Jury and Non-Jury Preliminary Call Lists. The filing of a pre-trial memorandum by all counsel is mandatory. Where all counsel of record are unanimous in their desire for an early pre-trial conference, the Clerk may be requested to list that case for pre-trial promptly, irrespective of its status on the trial list.

2. Within the period from the date of the published pre-trial list and the date of the actual pre-trial, counsel for all parties shall complete discovery. In personal injury cases, if an examination or re-examination of the injured party is necessary, such examination or re-examination shall be held and the written report of same shall be given to all counsel of record prior to the date of pre-trial. No further discovery (including medical examinations by defendants) will be permitted after the pre-trial except by permission of the Court to prevent manifest injustice. Within the same period (date of publication of pre-trial list to pre-trial) counsel for all parties, or their representatives, shall in good faith make every effort to explore the possibilities of settlement with their respective principals and with each other and shall be prepared to make a report thereon to the Judge presiding at the pre-trial conference. Counsel shall obtain authority from their respective principals to discuss settlement at the pre-trial conference and also arrange to have available for telephonic communications, during the pre-trial, their clients or principals.

3. The civil pre-trial list shall be published at least 90 days in advance of the period during which pre-trial conferences shall be held. Not later than 30 days after the publishing of said list, counsel for plaintiff shall file a written pre-trial memorandum with the Clerk of the Court and serve two copies on all other counsel of record.

Within 30 days of receipt of such pre-trial memorandum, all counsel served with plaintiff's memorandum shall file a written pre-trial memorandum with the Clerk of the Court and serve two copies on all other counsel of record. All memoranda shall be signed by and the pre-trial shall be attended by the lawyer who will try the case or by an attorney who is fully prepared and fully authorized for the purposes of pre-trial.

Plaintiff's pre-trial memorandum shall contain the following:

A. A brief summary statement of both the facts of the case and counsel's contentions as to the liability of defendant. In personal injury cases involving motor vehicles, a small, informal, schematic diagram should be included to show the names and directions of streets involved, traffic flow, the paths of the cars or pedestrians involved, and the point of impact.

B. A brief description of the damages claimed and the basis thereof. In personal injury cases as to each injured plaintiff there should be included a brief summary statement of:

(a) the principal injuries sustained;

(b) hospitalization and convalescence;

(c) present disability;

(d) a summary of the special monetary damages, to include a detailed statement of loss of earnings to date and a detailed statement as to the loss from future impairment of earning ca-

pacity, total medical expenses, property damage, and miscellaneous expenses.

(e) estimated value of pain, suffering, etc.

C. The names and addresses of all witnesses (except rebuttal) whom the plaintiff expects to call to testify at the time of trial. Failure to call at trial any listed witness shall not be a proper subject of jury argument unless justified by the record of the case exclusive of the pre-trial memorandum.

D. Designation by counsel of any special comments regarding discovery, amendments to the pleadings, or legal issues that might arise at trial.

E. Stipulations, including designation of any documents for which plaintiff's counsel seeks agreement on admissibility at time of trial.

F. An estimate of the number of trial days required for plaintiff's case.

Defendant's counsel in his pre-trial memorandum shall note, with the same degree of particularity as required by plaintiff, under correspondingly lettered paragraphs, significant comments indicating areas of agreement or disagreement regarding the material in plaintiff's memorandum. Where there is disagreement with respect to items in paragraphs A, B, D or E, counsel should briefly set forth his client's contentions or position on such matters. Defendant's counsel shall also include in his pre-trial memorandum the same material pertaining to defendant's case as required of plaintiff in paragraphs C, D, E and F.

APPENDIX D.

IMPOSITION OF SANCTIONS WITH RESPECT TO PRE-TRIAL PROCEDURES.

Adopted February 8, 1960.

For failure to appear at a pre-trial conference, or to participate therein, or to prepare therefor, the Court, in its discretion, may make such order with respect to the imposition of fines, costs and counsel fees, as is just and proper; with respect to the continued prosecution of the cause (complaint, cross-claim or counterclaim), a dismissal may be entered, or as to the defense, the preclusion of all or any part thereof, as is likewise just and proper.